

David Zigler 30(b)(6)

New City, NY

May 2, 2008

Page 1

2 UNITED STATES DISTRICT COURT  
3 SOUTHERN DISTRICT OF NEW YORK

4 -----

5 BRIARWOOD FARMS, INC.,

6 Plaintiff.

7 - vs - 07civ. 3657 (clb)

8 TOLL BROS., INC.

9 Defendant.

10 -----

11 FRIDAY, MAY 2, 2008  
12 11:15 A.M.

13 DEPOSITION of DAVID ZIGLER, 30(b)6  
14 witness, called for examination by counsel for  
15 the Defendants, held at the offices of Atzel,  
16 Scatassa & Zigler, 234 North Main Street, New  
17 City, New York, before Nancy Anne Flynn,  
18 Registered Professional Reporter and a Notary  
19 Public in and for the State of New York, and  
20 transcribed under her direction.

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**CERTIFIED COPY**

1       A P P E A R A N C E S :

2

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## CONTENTS

2

## EXAMINATION OF DAVID ZIGLER

PAGE

3

BY MR. BENENATI

4

4

5

6

## EXHIBITS

7

## DEFENDANT'S DESCRIPTION

PAGE

8

1 Notice of Deposition.

6

9

2 Complaint.

8

10

3 November 7, 2005 Agreement between

19

11

Briarwood Farms and Toll Brothers.

12

4 December 22, 2006 letter from Toll

51

13

Bros. to Briarwood Farms and Isaac Shiner.

14

5 January 22, 2007 letter to Briarwood Farms

70

15

and Donald Tirschwell from Toll Brothers.

16

6 January 30th, 2007 letter from Donald

84

17

Tirschwell to Toll Brothers.

18

7 Village of Pomona Certification of

29

19

Resolution adopted January 12, 2006.

20

8 Set of drawings. (Deemed marked)

39

21

(Exhibits retained)

22

23

24

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David Zigler 30(b)(6)

May 2, 2008

New City, NY

Page 4

1 David ZIGLER,  
2 having been duly sworn by a Notary  
3 Public for the State of New York,  
4 testified as follows:

5 EXAMINATION BY

6 BY MR. BENENATI:

7 Q Mr. Zigler, my name is Michael  
8 Benenati. I am from the Law Offices of Bleakley,  
9 Platt & Schmitt. We represent a defendant named  
10 Toll Bothers, Inc. in litigation brought by  
11 Briarwood Farms, Incorporated.

12 I'm going to be asking you a few  
13 questions today. If at any time you don't  
14 understand a question of mine, please ask me to  
15 rephrase it or we will do the best we can do with  
16 that.

17 Also, all your answers have to be  
18 verbal since she's recording everything we say;  
19 she can't record nods of the head, et cetera.  
20 Also, it's very important, you may anticipate a  
21 question that I'm going to ask you, but please  
22 let me complete the question prior to answering  
23 because, again, she can only record one of us  
24 speaking at a time.

25 If you want to take a break at any

1 David Zigler

2 point in time, that's fine, talk to your attorney  
3 here today, that's fine, but as long as there is  
4 not a pending question. All right?

5 A Not a problem.

6 MR. HASPEL: Just for the record,  
7 although Mr. Zigler is in fact friendly  
8 to my client, he is not my client.

9 MR. BENENATI: Right, but he is  
10 the 30(b)6 designee that your client  
11 presumably designated for this  
12 deposition today, correct?

13 MR. HASPEL: No. We designated  
14 Mr. Zigler by communication between  
15 myself and Mr. Harrington as the person  
16 best suited to answer the questions  
17 that we believe are going to be  
18 proposed, and that was basically by a  
19 friendly discussion between attorneys,  
20 trying to get to the answers to the  
21 root questions as quickly as possible.

22 Mr. Zigler is, in fact, a  
23 professional employed by my client, but  
24 I think it would be a stretch to say  
25 that he is my client.

David Zigler 30(b)(6)

New City, NY

May 2, 2008

Page 6

1 David Zigler

2 MR. BENENATI: Okay. I'm just  
3 going to introduce Exhibit 1 and ask  
4 Mr. Zigler to take a look at it. It's  
5 a Notice of Deposition.

6 (Notice of Deposition was marked  
7 as Exhibit 1 for identification.)

8 Q I'll ask the witness, Mr. Zigler,  
9 have you ever seen this document before  
10 (handing)?

11 A No.

12 Q If you could turn to the second  
13 page, do you see at the top it has topic areas.  
14 Can you just read those topic areas, read off,  
15 just for the record? Or I can read it. On page  
16 two it says Designated Issues?

17 A Oh, "Contract of sale entered into  
18 by the parties for the development of Halley  
19 Estates II subdivision." That's number one.

20 Q Okay. Let me ask you a question  
21 about that. Do you have any knowledge about that  
22 issue?

23 A No, not at all.

24 Q The second issue, and I'll read it,  
25 "The plaintiff's efforts, if any, to secure

1 David Zigler

2 approvals from the Village of Pomona Steep Slope  
3 Ordinance for the Halley Estates II subdivision.  
4 Do you have any knowledge about that issue?

5 A I would have to ask you to describe  
6 "secure approvals," what does that mean?

7 Q Steep slope permits, with respect to  
8 procuring steep slope permits pursuant to the  
9 steep slope ordinance.

10 A Steep slope permits require an  
11 application.

12 Q So let me back up, sorry to  
13 interrupt you. It would be the application  
14 process, everything in between the issuance of a  
15 permit?

16 A No, we have not tried to get a steep  
17 slope permit.

18 Q But are you familiar with the issue?

19 A Oh, absolutely.

20 Q Okay. And Briarwood Farms' efforts,  
21 if any, to cure the alleged contract defaults  
22 cited in Toll Brothers' January 22nd, 2006 letter  
23 to plaintiff." I know that's kind of a --

24 A Broad scope.

25 Q Right. I don't know if you have any

1 David Zigler

2 knowledge with respect to the letter that's  
3 referred to in there?

4 A I have a little knowledge of some of  
5 the items when they pertain to our portion of the  
6 proposal.

7 Q Okay. And the final issue, "The  
8 factual basis of the claims asserted by plaintiff  
9 in this litigation?

10 A No, no knowledge.

11 (Complaint was marked as Exhibit  
12 2 for identification.)

13 Q Okay. That's all for that one. I'm  
14 just going to show you what has been marked as  
15 Exhibit 2, it's titled Complaint. I ask you to  
16 take a look at that (handing). Mr. Zigler, have  
17 you ever seen this document before?

18 A No.

19 Q Okay. If you would just look  
20 through it. I'm going to ask you, are you  
21 familiar with any of the claims that are asserted  
22 in the Complaint?

23 A What am I actually looking for now?

24 Q The claims.

25 A Some of them I'm familiar with, yes.



1 David Zigler

2 Q Why don't you look through the whole  
3 thing.

4 A How would you describe familiar? I  
5 mean, I'm familiar with trying to appropriate a  
6 final approval.

7 Q We'll go into some of those issues  
8 later. I'm just saying generally with respect to  
9 the claims as asserted in the complaint?

10 A Very few of them.

11 Q Okay. We will go into more detail  
12 about what claims you are familiar with.

13 A Okay.

14 Q Have you ever seen that document  
15 before, though?

16 A Not that I'm familiar with, no.

17 Q I'll take that back. I'm just going  
18 to first ask you some background questions,  
19 generally. What is your date of birth?

20 A 7/1/53.

21 Q Are you currently employed?

22 A Yes.

23 Q Where are you employed?

24 A Atzel, Scatassa & Zigler.

25 Q And generally, what is that business

1 David Zigler

2 that you refer?

3 A Engineering, surveying, and  
4 planning.

5 Q What is your position with that  
6 firm?

7 A I'm a licensed land surveyor but I'm  
8 president of the firm.

9 Q By president, what do you mean?

10 A My wife says that too. Really  
11 nothing, just a title.

12 Q Are you responsible for the business  
13 operations of your firm?

14 A Not really, although there is a  
15 title to it, we pretty much all four of us run  
16 the business together. It's just really for tax  
17 purposes and for, you know, parties.

18 Q Is each named person of the firm a  
19 licensed land surveyor?

20 A Yes, although Ray Amate who is an  
21 engineer isn't, he is a part of the firm, but his  
22 name is not on the door.

23 Q And when were you licensed as a land  
24 surveyor?

25 A 1983.

1 David Zigler

2 Q And what is your educational  
3 background, generally?

4 A Basically, just various courses,  
5 continuing education, no really thorough college  
6 background in surveying.

7 Q Do you have a college degree?

8 A No.

9 Q But you've taken various courses?

10 A Right.

11 Q In order to get licensed as a land  
12 surveyor, correct?

13 A Yes.

14 Q When was your firm first retained by  
15 Briarwood Farms with respect to the Halley  
16 Estates II project?

17 A I would have to guess in the late  
18 eighties or early nineties. It's been quite a  
19 while, so, maybe early nineties.

20 Q Do you know from whom retained your  
21 firm, whom from Briarwood Farms?

22 A Mr. Hershkowitz, Senior.

23 Q What is Mr. Herskowitz' first name?

24 A Israel.

25 Q Were you the person from your firm

1 David Zigler

2 that spoke with Mr. Hershkowitz upon the  
3 retention of the --

4 A Always, since the very beginning, I  
5 handled it in the firm, although I wasn't the  
6 president then.

7 Q And what did Mr. Hershkowitz retain  
8 your firm to do, if anything?

9 A Gather final approval for a  
10 subdivision, hopefully.

11 Q Is that subdivision, was that named  
12 Halley Estates at some period in time?

13 A Halley Estates II. It was actually  
14 a proposed section off of Halley Estates I.

15 Q When you say "proposed section,"  
16 what do you mean by that?

17 A Halley Estates I was a dead-end  
18 street, so by planning standards, you must at  
19 least give a concept layout of the portion of  
20 property which that dead-end street would serve.  
21 So although there was never a submission to  
22 Halley Estates II, there was always a concept map  
23 of the possible subdivision.

24 Q Did you participate in Halley  
25 Estates I?

1 David Zigler

2 A No, I think that was Halloran and  
3 Caruso, a different firm.

4 Q Do you know when Halley Estates I  
5 received its final subdivision approval?

6 A I would have to say about five years  
7 before we started, whatever that date was. It  
8 was five or six years, it was basically completed  
9 before we started Halley Estates II, completed in  
10 construction.

11 Q Was Mr. Hershkowitz a land owner or  
12 something else?

13 A I deal with the person, I don't know  
14 if he's a contract vendee or owner when I deal  
15 with him. The only time I know that is when I  
16 start to fill out the application.

17 Q Do you know that now?

18 A I believe when we started he was  
19 just a vendee. I'm not too sure. It was a long  
20 time ago.

21 Q Sure.

22 A I was younger.

23 Q How long has your firm been in  
24 existence?

25 A The original proprietors were Atzel

1 David Zigler  
2 and Scatassa, and that started in 1968. I became  
3 a partner in the firm, which then changed the  
4 name to Atzel, Scatassa & Zigler in the late  
5 eighties, '89 I'll guess.

6 Q Have you ever participated in  
7 obtaining steep slope approvals?

8 A The firm or me personally?

9 Q Well, you through the firm, in your  
10 employment with the firm.

11 A Well, being again the president, I  
12 know what goes on all the time, and our firm has  
13 obtained many of them. Personally I've probably  
14 only worked on less than ten, I'll say.

15 Q And when you say less than ten, what  
16 do you mean?

17 A Ten separate lots.

18 Q Is that ten separate lots within a  
19 subdivision or subdivisions?

20 A In this case it happens to be one  
21 single subdivision.

22 Q Do you know the name of that?

23 A High Gate Estates.

24 Q What was the basis for your role in  
25 obtaining the steep slope approvals?

1 David Zigler

2 A Application, submission,  
3 representation and final approval with whatever  
4 modifications had to be made to that plan.

5 Q Was that in conjunction with  
6 securing a final subdivision approval from the  
7 planning board?

8 A No. Highgate Estates was approved  
9 and filed in the late sixties.

10 Q How did it come about that you were  
11 retained to obtain these steep slope approvals  
12 for the Highgate Estates?

13 A Somebody walked in and paid us money  
14 to represent them.

15 Q Were they the owners of the ten  
16 separate lots?

17 A No, again, it was various  
18 contractors in various degrees, whether they were  
19 representing a person who owned a lot, let's say  
20 a single homeowner, or whether they were  
21 representing themselves building several lots, or  
22 they were representing themselves as a contract  
23 vendee, building several lots. So it could be in  
24 various degrees of ownership.

25 Q When you obtained or initiated these

1 David Zigler

2 steep slope approvals, did you do it in  
3 conjunction with all ten or was it separate?

4 A No, all separate. Every lot is a  
5 separate application. Although, if you are doing  
6 contiguous lots, you can sometimes process them  
7 together. But there is still a separate  
8 application.

9 Q Do you recall generally how long  
10 each of those application processes took?

11 A They can be as simple as three  
12 months, I guess, because you still have to do the  
13 SEQOR process; some of them have been as long as  
14 five months.

15 Q Is that based on your personal  
16 history with Highgate Estates, the lots in  
17 Highgate Estates, or something else?

18 A No, personal history.

19 Q You said your firm has personnel  
20 that is capable of obtaining or has obtained  
21 steep slope approvals?

22 A We are all capable. But most of  
23 them I have done, as I said, there were maybe ten  
24 or less. John Atzel, who you hear speaking in  
25 the other room, has probably applied for and



1 David Zigler

2 obtained approvals for I'll guess maybe fifteen  
3 to twenty.

4 Q Is there someone in your firm that  
5 you collectively designate to do that type of  
6 work or is it based on --

7 A It's either me or John, because it  
8 depends on who is fool enough to attempt it, but  
9 either John or I.

10 Q As part of the firm's retention by  
11 Mr. Hershkowitz, did you or your firm ever obtain  
12 steep slope approvals for the Halley Estates II?

13 A Never been denied.

14 Q Did anybody from your firm start the  
15 application process?

16 A Oh, you were saying just for Halley?

17 Q Yes, just for Halley Estates II --

18 A -- Halley Estates II? No, no, we  
19 didn't start. We never started that process.

20 Q And just so I'm clear, because I  
21 think there was back and forth between us, with  
22 respect to the Halley Estates II project, did  
23 your firm ever initiate the steep slope  
24 application process?

25 A Yes and no. We have discussed this

1 David Zigler

2 before preliminary, and as recently as two weeks  
3 ago --

4 Q Sure.

5 A -- with Pomona, and the advisors to  
6 Pomona, and at the last workshop they asked me to  
7 compile a list of lots which I thought would  
8 require the steep slope application.

9 Q Was that at the April 25th meeting?  
10 Let me back up, March 25th meeting?

11 A No, it was at the workshop which  
12 would have been about two weeks ago, early April.

13 Q Did you compile a list of lots?

14 A Not yet, because that workshop  
15 produced a resolution, and that's hopefully they  
16 are going to vote on this month, May. And  
17 whatever is in that resolution I'll have to  
18 address. So I only address things when somebody  
19 writes it down. At the workshop we were talking  
20 verbally about something.

21 Q Is that just to get an idea as to  
22 how many lots might be impacted by the steep  
23 slope ordinance?

24 A That was what their request was.  
25 They had a thought on how many, and I had a

1 David Zigler

2 completely different thought. But if I can prove  
3 I was correct, I would have less lots then they  
4 thought it would be.

5 Q How many lots did you calculate  
6 within the Halley Estates II subdivision would be  
7 impacted by the steep slope ordinance?

8 A I don't do that until I get a  
9 written comment or response or memo from the  
10 planning board, so I did not address it, didn't  
11 look at it.

12 Q You didn't address it for that --

13 A I didn't calculate anything.

14 Q Okay. Prior to testifying right now  
15 here today, did you review any documents?

16 A What would you say prior is? Time  
17 span.

18 Q Since you found out that you were  
19 going to be testifying here today?

20 A No. Even from the previous cancel,  
21 I have not pulled out the folders. Other than to  
22 go to the workshop which was, you know -- I think  
23 it was early April.

24 (November 7, 2005 Agreement  
25 between Briarwood Farms and Toll

1 David Zigler

2 Brothers was marked Exhibit 3 for  
3 identification.)

4 Q I am going to show you a document  
5 that's been labeled Exhibit Number 3, and ask you  
6 to take a look at that (handing).

7 MR. BENENATI: Joe, I have a copy  
8 for you (handing).

9 MR. HASPEL: I love copies.

10 A Why am I studying this for?

11 Q Just take a look at it, and I will  
12 ask you a specific question or questions  
13 regarding it after you've done. Take as much  
14 time as you need.

15 You'll see in the first page the  
16 document is dated the 7th of November 2005, and  
17 it says between -- back up. It says, "This  
18 agreement is made this 7th of November 2005  
19 between Briarwood Farms, Inc., and it lists their  
20 address, and Toll Brothers, Inc., and it lists  
21 their address.

22 Did you ever see this document prior  
23 to November 7th, 2005?

24 A No.

25 Q Have you ever seen this document

1 David Zigler

2 prior to today?

3 A Not that I remember.

4 Q Would you typically see a contract  
5 like this in the course of your work for a seller  
6 of land or a vendee?

7 MR. HASPEL: Why don't we define  
8 what kind of contract this is? I mean,  
9 I just think --

10 MR. BENENATI: You're right,  
11 that's a good point.

12 MR. HASPEL: Or ask him if he  
13 knows what this kind of contract is or  
14 something like that.

15 Q Do you know what this contract is?

16 A No.

17 MR. HASPEL: Then it's hard to  
18 discuss it.

19 Q All right, let's put the contract  
20 away for a second. Let me ask you this: When  
21 did you start with the process of obtaining the  
22 necessary approvals with respect to moving  
23 towards final subdivision approval with respect  
24 to the Halley Estates II subdivision?

25 A Well, technically, I guess you would

1 David Zigler

2 say that would be after our preliminary approval,  
3 so that would be after the date of that  
4 resolution that I handed you. That's, I guess,  
5 you know, for previous years we tried to get  
6 final approval too.

7 MR. HASPEL: Could you read back  
8 the question?

9 (The question was read.)

10 MR. HASPEL: I am going to object  
11 to the form of the question.

12 Did hearing the question over  
13 help you any? Because you answered a  
14 different question.

15 THE WITNESS: Yeah, well, for  
16 final you have to have preliminary,  
17 that's the way I answered it.

18 Q When did you start even before --

19 MR. BENENATI: My question  
20 referred to --

21 MR. HASPEL: When did you start  
22 the process, period.

23 MR. BENENATI: That's the way I  
24 asked it.

25 A Early eighties, I mean late

1 David Zigler

2 eighties, early nineties.

3 Q At some point in time did you obtain  
4 or did Mr. Hershkowitz obtain preliminary  
5 approval relevant to the Halley Estates II  
6 subdivision?

7 MR. HASPEL: Just for definition  
8 purposes, when you say,

9 "Mr. Hershkowitz, you mean Briarwood?

10 MR. BENENATI: Briarwood, yes.

11 A Yes, the date of that resolution  
12 would be preliminary approval.

13 Q Just for my sake, is Mr. Hershkowitz  
14 a part of Briarwood Farms, Inc., or is he the  
15 president of Briarwood Farms, or is he affiliated  
16 in any way?

17 A I don't know that.

18 MR. HASPEL: And again, just for  
19 clarity purposes, when you said  
20 Mr. Hershkowitz then, you're talking  
21 about Israel Hershkowitz, because he is  
22 the one that was mentioned.

23 MR. BENENATI: He was the one  
24 that, yes, I'm sorry.

25 MR. HASPEL: But he is a

1 David Zigler  
2 different name than the name that's on  
3 the agreement of sale that you just  
4 referred to, that's why I just want to  
5 make sure we have our Herskowitzes  
6 sorted out.

7 MR. BENENATI: Right.

8 Q Do you know who Briarwood Farms --  
9 do you deal with anyone from Briarwood Farms,  
10 Inc. currently?

11 A I just deal with people and I don't  
12 know what LLC or business or what their handle  
13 is.

14 Q Currently who do you deal with from  
15 Briarwood Farms?

16 A You would have to give me a list of  
17 people who are involved with Briarwood Farms.

18 MR. HASPEL: I think he is asking  
19 you that question.

20 A I deal with Mr. Hershkowitz.

21 MR. HASPEL: Which  
22 Mr. Hershkowitz?

23 THE WITNESS: Israel, sometimes  
24 Joe.

25 Q Who pays your firm's fees?



1 David Zigler

2 A That would be Briarwood.

3 Q Do you submit invoices to Briarwood  
4 or Mr. Hershkowitz, Israel Hershkowitz?

5 A I believe it's Briarwood.

6 Q Do you know whether Mr. Hershkowitz  
7 is associated at all with Briarwood Farms, Inc.?

8 A I think he is. I mean, I could --

9 MR. HASPEL: Again, just for  
10 clarity purposes, we've now heard two  
11 Herskowitzes and you keep saying "Mr.  
12 Hershkowitz."

13 MR. BENENATI: When I refer to  
14 Mr. Hershkowitz, I am referring to  
15 Israel Hershkowitz, as you mentioned.

16 MR. HASPEL: I don't care which  
17 way it goes, but I want to know what  
18 the transcript is going to read.

19 MR. BENENATI: Okay.

20 Q My prior question was, other than  
21 Mr. Hershkowitz, Israel Hershkowitz who you  
22 mentioned, is there anyone else from Briarwood  
23 Farms that you regularly speak with?

24 A Yeah, I'll speak with Joe, would be  
25 the only two people I deal with in the

1 David Zigler

2 Hershkowitz family.

3 Q Is that Joe Hershkowitz or somebody  
4 else?

5 A Joe Hershkowitz.

6 Q Who do you believe Joe Hershkowitz  
7 is, is that --

8 A Israel's son. He is usually who I  
9 deal with, the two of them, when I'm doing  
10 planning procedures.

11 Q I'm going to show you what was  
12 marked as Exhibit A at a prior nonparty  
13 deposition dated March 25, 2008, and ask you to  
14 take a look at that (handing).

15 MR. BENENATI: Sorry, Joe, I  
16 don't have another copy.

17 MR. HASPEL: That's okay.

18 MR. BENENATI: Just for the  
19 record, Exhibit A is identified as Site  
20 Development Plan Review Chapter 119,  
21 which we took off the Village of  
22 Pomona's website.

23 MR. HASPEL: Do you have a  
24 question?

25 MR. BENENATI: Yes.

1 David Zigler

2 Q Are you familiar with Chapter 119,  
3 Mr. Zigler?

4 A Yes.

5 Q And at any time prior to Briarwood  
6 Farms obtaining preliminary approval for the  
7 Halley Estates II subdivision, did you apply for  
8 a steep slope permit pursuant to Chapter 119?

9 MR. HASPEL: I'm going to object  
10 to form, but if you can answer that, go  
11 ahead.

12 A It was discussed before preliminary  
13 if we actually need to or may we apply, and  
14 officially we did not apply.

15 MR. BENENATI: Can you read that  
16 answer back?

17 (The answer was read.)

18 Q When you say, "It was discussed,"  
19 who were you referring to, who discussed it?

20 A Planning board advisors and me.

21 Q And what, if anything, was discussed  
22 relative to steep slope permits and the Halley  
23 Estates I subdivision?

24 A That would really take a couple of  
25 days to format all that, because our entire plan

1 David Zigler

2 was based on the mitigation of steep slopes, and  
3 I was under the impression that that would allow  
4 us to grandfather or be exempt from the steep  
5 slope application.

6 Q When you say, "the plan."

7 MR. BENENATI: Actually, can you  
8 read that back?

9 (The answer was read.)

10 Q When you say your plan was to  
11 mitigate the steep slope issue, if you will, do  
12 you mean the preliminary approval plan?

13 A When I speak of plans, I'm actually  
14 speaking about our drawings. Our drawings were  
15 detailed in excessive amounts to mitigate steep  
16 slopes, far more than any other plan developed in  
17 the village.

18 Q Were you ever told that you would be  
19 allowed to grandfather in the steep slope  
20 ordinance by anybody from the planning board?

21 A Yes. We believed that we would be  
22 exempt from it at one point, and until the last  
23 workshop, I really didn't know where we stood on  
24 that.

25 Q Did that position change at all?

1 David Zigler

2 A When they asked me to provide a list  
3 of lots that would require steep slope  
4 application, I would say that that changed it.

5 Q And that was at the recent meeting,  
6 correct, or before?

7 A The workshop in early April.

8 MR. BENENATI: Mark this, please.

9 (Village of Pomona Certification  
10 of Resolution adopted January 12, 2006  
11 was marked as Exhibit Number 7.)

12 Q I'm going to show you what has been  
13 marked Exhibit 7, it's titled Village of Pomona,  
14 it's a certification, it says, "The enclosed is a  
15 true and correct copy of the Resolution adopted  
16 by the Planning Board of the Village of Pomona on  
17 January 12th, 2006 (handing). I ask you to take  
18 a look at that (handing).

19 A Um-hm.

20 Q Prior to that resolution being  
21 issued, Mr. Zigler, did Briarwood Farms submit  
22 any other plans or preapproval subdivision plans  
23 with respect to the Halley Estates II  
24 subdivision?

25 MR. HASPEL: I am going to object

1 David Zigler

2 to form. Do you understand the  
3 question?

4 THE WITNESS: No, because every  
5 time I go to the board I have to submit  
6 plans.

7 BY MR. BENENATI:

8 Q Let me back up. Was there any  
9 package of documents that was submitted -- was  
10 there a last set of plans that were submitted  
11 before the preliminary approval?

12 A Absolutely.

13 Q Does that resolution constitute the  
14 preliminary approval?

15 A Yes.

16 Q I want to show you what has been  
17 previously marked as Exhibit C-1. I ask you to  
18 take a look at that.

19 A I'm familiar with it.

20 Q And that document is labeled  
21 Disturbed Area Slope Legend. Did you prepare  
22 this document?

23 A Somebody in the firm did, under my  
24 direction, yes.

25 Q Can you generally describe what this

1 David Zigler

2 document shows?

3 A This map depicts the lots in the  
4 subdivision. And it's detailed with contours and  
5 shaded with steep slopes in three different  
6 degrees. And that's only within the lots, that  
7 shaded area, if it so meets the criteria, and  
8 it's only in the disturbed area of that lot.

9 Q And what was the purpose for  
10 designating the three different slopes?

11 A The purpose for this map was the  
12 disturbance on-site and the slopes are just part  
13 of their criteria, so that was incorporated in  
14 and they wanted to know what the disturbance was  
15 on the site and the type of slope.

16 Q Would this map be used to identify  
17 which lots need steep slope permits under the  
18 ordinance?

19 A No, it doesn't qualify.

20 Q Why doesn't it qualify?

21 A Because you have to have a site  
22 specific home to apply for the application of  
23 steep slopes. And this is a generic home on a  
24 generic site.

25 Q Why couldn't -- so in order to get

1 David Zigler

2 the permit, you have to have -- the steep slope  
3 permit -- is it your testimony that you have to  
4 have the site specific home laid out on the lot,  
5 correct?

6 A As to the law, it's part of a  
7 building application, and it's the interpretation  
8 of the building inspector at the time of the  
9 application. As far as I know, that's the way  
10 they've been handling it, Pomona.

11 MR. HASPEL: Just again for the  
12 record, Pomona is the municipality that  
13 we are --

14 THE WITNESS: Right.

15 Q And when I say subdivision, I'm  
16 going to be referring to the Halley Estates II  
17 subdivision?

18 A Okay.

19 Q Is it fair to say that to date the  
20 subdivision has not received final approval by  
21 the village planning board?

22 A Absolutely.

23 Q With respect to after the date that  
24 the resolution was initiated that's depicted in  
25 Exhibit 7, did you or anyone else from Briarwood



1 David Zigler

2 Farms apply for any steep slope approvals  
3 relative to the subdivision?

4 A No, not that I'm aware. This firm  
5 didn't.

6 Q Would there be anyone else other  
7 than this firm that would have made that  
8 application after the resolution was issued?

9 A The owner of the property, the  
10 applicant, could make an application.

11 Q Who would be the applicant?

12 A Whoever, it could be the owner of  
13 the property or contract vendee or whatever.

14 Q Or anyone on behalf of Briarwood  
15 Farms, correct?

16 A Yes.

17 Q But to your knowledge was that ever  
18 done?

19 A Not that I'm aware of.

20 Q And I'm only asking you what you are  
21 aware of. Looking on Exhibit C-1, do you know  
22 how many lots within the subdivision would be  
23 affected by this steep slope ordinance?

24 A No, I would wait for the resolution  
25 to come out for final, being that we discovered

1 David Zigler

2 it at the workshop. Whatever comments come out  
3 in that resolution, I would address. I have an  
4 understanding that that might be one of them, but  
5 I did not calculate anything yet.

6 Q But can you, right now, as we sit  
7 here today looking at this map and determine  
8 which lots could be affected by the steep slope  
9 ordinance? Let me back up. Are you familiar  
10 with the steep slope ordinance?

11 MR. HASPEL: I object to the  
12 form: If you want to go off the  
13 record, I will explain to you why.

14 MR. BENENATI: Okay.

15 (Brief discussion)

16 MR. HASPEL: In the  
17 off-the-record discussion, there was a  
18 discussion as to what was creating the  
19 ambiguity of the questions, and  
20 Mr. Zigler started best describing his  
21 understanding.

22 And I think counsel and I agree  
23 that the description of this  
24 understanding as to the map is the  
25 answer to the question and we now are

1 David Zigler  
2 going to ask Mr. Zigler to restate what  
3 he stated off the records. Fair  
4 enough?

5 MR. BENENATI: Fair enough.

6 A Basically, my explanation, or my  
7 question to the advisors to the planning board  
8 had to do with our phasing of the site.

9 And although drawing number seven  
10 indicates steep slopes in three different  
11 classifications of the steep slopes, we had  
12 already gathered permission during the process of  
13 developing the plan to grade off road, and that  
14 would be as an example, lots 26, 27, 28 and 29,  
15 we have gathered that permission to grade that  
16 lot before they go for a building permit.

17 So I've never gotten an answer from  
18 the planning board or from its advisors, but then  
19 the indicated steep slopes on that lot would be  
20 gone. So do I have to apply for a steep slope  
21 application for those lots?

22 It's very detailed in lot number  
23 seven because on lot seven, directly in front of  
24 it, our road goes through a very steep slope  
25 area, and as we have a right to grade outside the

1 David Zigler

2 road, that would eliminate some steep slope. So  
3 my question was to the planning board, and to the  
4 advisors, if we have these rights why do we have  
5 to come back in for the steep slope?

6 That's even carried further back  
7 into the development of the average density where  
8 they wanted us to build.

9 Q When was that discussion had that  
10 you just mentioned with respect to --

11 A We've had that discussion for two  
12 years with the planning board.

13 Q Two years from today, correct?

14 A For the last two years, last three  
15 years, prior to preliminary. And that's on the  
16 record within the planning board minutes that we  
17 discussed that and we tried to mitigate, and  
18 basically tried to be exempt from this steep  
19 slope law. Nobody has said one way or the other  
20 yet.

21 Q When you say "prior to preliminary,"  
22 do you mean preliminary approval for the  
23 subdivision?

24 A Yes.

25 Q With respect to a hypothetical

1 David Zigler

2 building on lot 29, might the steep slope  
3 ordinance be impacted if one built outside of  
4 that envelope, hypothetical envelope?

5 A No, because we've already been given  
6 permission to level the lot. So if in fact we  
7 followed a phasing of the construction as  
8 indicated on another plan, and detailed, we would  
9 not have any steep slopes on lot 29 when we  
10 applied for a building permit, because, by  
11 Pomona's code, you must have all the improvements  
12 in and the road paved. So that would far extend  
13 beyond the right of way in some areas.

14 Q Well, with respect to lot 29, for  
15 example, with the hypothetical structure, was the  
16 grading performed prior to the creation of this  
17 map?

18 A No, no, the grading I'm speaking  
19 about is after you receive final, when you start  
20 to install the improvements.

21 Q But if the actual structure's  
22 blueprint changes, doesn't so the grading?

23 A That's what this map indicates.  
24 This map indicates grading on the entire site for  
25 a generic house. But within our set of plans, we

1 David Zigler

2 have details on construction improvements with  
3 areas that we are allowed to disturb prior to  
4 building permit.

5 Q What document are you referring to?

6 A Some drawing in our sequence of  
7 maps, whatever drawing depicts construction  
8 phasing.

9 MR. HASPEL: Just again for  
10 clarification, the map that we are  
11 looking at, C-1, is, in the bottom  
12 right-hand corner says something called  
13 "Drawing Number 7," does that indicate  
14 that this was the seventh page in a  
15 collection of drawings?

16 A Yes.

17 Q Is it your that many some other page  
18 has what you described?

19 A Absolutely.

20 Q Within the sequence?

21 A Yes.

22 Q Do you have other pages?

23 A Sure.

24 Q Can we see them?

25 A Sure.

1 David Zigler

2 MR. HASPEL: Prior to today's  
3 deposition, Mr. Zigler had provided  
4 counsel, including myself, with a full  
5 set of drawings which neither counsel  
6 unfortunately brought with them to  
7 today's deposition.

8 What Mr. Zigler has just produced  
9 was a set of drawings, 22 pages long,  
10 with page number 7 being a duplicate of  
11 Exhibit C-1.

12 So, for instance, we are going to  
13 be discussing this, and if Mr. Benenati  
14 wants to stipulate at a later date to  
15 take what has been previously supplied  
16 to us and call it, subject to  
17 stipulation between the parties,  
18 Exhibit 8, we will mark one of the ones  
19 that we have already been supplied  
20 subject to the stipulation that that is  
21 in fact what we're looking at.

22 We will refer to this complete  
23 set as Exhibit 8.

24 (Set of drawings were deemed  
25 Exhibit 8.)

1 David Zigler

2 MR. BENENATI: Okay, that's fine.

3 A Basically, this is a detail drawing  
4 number three of the grading, and this grading  
5 page which requires three different drawings to  
6 cover the entire site is in such detail that it  
7 shows a proposed home and grading around the  
8 proposed home. And the detail within that lot  
9 details the envelope of the home, envelope of the  
10 lot, which you can build within, and it also  
11 details the maximum size of the home and the  
12 location on the lot.

13 And that, we thought, was mitigating  
14 this steep slope. But in addition to that, what  
15 I was previously talking about was detail on  
16 drawing number nine, which is labeled Final  
17 Erosion Control Plan, and that has a table of  
18 construction phasing which includes some of these  
19 steep slope areas to be disturbed.

20 MR. HASPEL: Could you again for  
21 definitional purposes define, when you  
22 used the word disturbed a number of  
23 times, we are not builders.

24 Q Yes.

25 A "Disturbed" in any pretext basically



1 David Zigler

2 means going in and cutting a tree and regrading a  
3 lot. So removing trees and regrading the lot is  
4 disturbing.

5 MR. HASPEL: I'm sorry to  
6 pre-empt, but I just like to know what  
7 we're talking about.

8 A And the table on page nine describes  
9 the construction activities that would be  
10 required to do the improvements within the right  
11 of way, and it also details areas outside the  
12 right of way which would be disturbed, although  
13 they are in steep slope areas.

14 Q Is it your understanding that with  
15 respect to disturbing those areas within the  
16 steep slope you are not required to get a steep  
17 slope permit; is that correct?

18 A That's correct.

19 Q Has that been affirmed by the  
20 planning board, that understanding?

21 A I would say the attorney would give  
22 direction to that. I really don't know if it's  
23 ever been answered yet, to tell you the truth.

24 Q Is it something that's been  
25 discussed?

1 David Zigler

2 A Many times.

3 Q What's generally been the resolution  
4 of those discussions?

5 A Usually when I have a concern about  
6 some kind of operation on a subdivision plan,  
7 I'll address it directly or try to indirectly  
8 solve the problem.

9 And I believe that what we were  
10 trying to do was to bypass that steep slope law,  
11 and that's why we offered at the time of the  
12 environmental impact, maximum house sizes and  
13 direct areas that the houses could be placed in.  
14 So we thought that we were mitigating that.

15 Q And has the planning board disagreed  
16 with that assumption about mitigating that you  
17 just mentioned?

18 A They seem to be happy with the plan  
19 and were not requirers, I think it's really the  
20 interpretation of the attorney whether you have  
21 to go. There's nothing, as far as we understand  
22 now, there is no mechanism within the Village of  
23 Pomona that allows us to bypass that application,  
24 although we have set this product up to high  
25 speed the application.

1 David Zigler

2 Q But you still, as the process has  
3 been set up at high speed, you still have to get  
4 a steep slope permit, correct?

5 A I haven't gotten that answer yet.  
6 So as I said, we directly asked them if this  
7 being as an average density requires it, and we  
8 really never received an answer.

9 And our thought, meaning the firm's  
10 thought, was to try to answer the steep slope  
11 requirements during the process, and that way it  
12 would, you know, basically make the application  
13 if we're required to go, make the application a  
14 one-month deal.

15 Q You mean the application for the  
16 final approval?

17 A Steep slope.

18 Q Steep slope?

19 A If it's interpreted.

20 Q And the attorney that you're  
21 referring to, that's the Village of Pomona  
22 attorney?

23 A Doris Ullman.

24 Q With respect to other subdivisions  
25 that you may have worked on, you've worked on

1 David Zigler

2 other subdivisions, correct?

3 A In Pomona?

4 Q Yes.

5 A Yes.

6 Q With respect to the work that you're  
7 doing with the Halley Estates II subdivision  
8 approval, correct?

9 A No.

10 Q Okay.

11 A Previous subdivisions that we have  
12 recently received approval on after the steep  
13 slope law, none of them qualified for the steep  
14 slope.

15 Q So this is the first one that  
16 impacts the steep slope law in the Village of  
17 Pomona, right, the first subdivision that you've  
18 worked on that impacts?

19 A No -- yes, I mean, the answer is yes  
20 to that.

21 Q With respect to getting the final  
22 subdivision approval.

23 A Yes, but this was unique because  
24 it's an average density plan, which is a whole  
25 different realm of subdivision approval.

1 David Zigler

2 Q Why is that unique?

3 A Because the plan, as laid out, is  
4 basically designed by the planning board to  
5 mitigate certain environmental impacts.

6 So when we designed this plan, and  
7 for years which probably took five years, maybe  
8 six years on road pattern, the plan was designed  
9 to not impact steep slopes.

10 Q Um-hm.

11 A So I thought that would be a portion  
12 of how we would be exempt from going for steep  
13 slopes.

14 Q But you are not certain that you  
15 will be exempt from steep slopes?

16 A I don't have an answer on that yet.

17 Q Do you anticipate getting an answer  
18 soon about that or what is your assessment when?

19 A I listen to the attorney, and the  
20 attorney told me, get final approval and then we  
21 will ask questions.

22 Q Meaning final approval for the  
23 subdivision, correct?

24 A Yes.

25 Q When do you anticipate getting final

1 David Zigler

2 approval for the subdivision?

3 A We believe the vote will be May 8th,  
4 I believe it is, but when we receive the  
5 resolution, it could be four or five months after  
6 that. They don't move very fast.

7 Q So to date you haven't had,  
8 Briarwood Farms has not had final subdivision  
9 approval?

10 A Right.

11 Q Is it typical that the steep slope  
12 permit would be applied for after the preliminary  
13 approval of a subdivision, generally, if you  
14 didn't have this kind of unique situation?

15 A No.

16 MR. HASPEL: I object to the  
17 form, but if you understood it, go  
18 right ahead. You seem to have  
19 understood it.

20 A No. A steep slope is a portion of a  
21 building permit application. A building permit  
22 application can only be procured after final  
23 approval and the improvements are installed on  
24 site. A building permit is the application to  
25 build a home, and that's when steep slopes kick

1 David Zigler

2 in, as far as requirement for the application or  
3 not.

4 Q But under that scenario, under your  
5 assumption, wouldn't you have to wait until you  
6 had the actual building plans laid out on the  
7 parcel of land?

8 A No. Because again, if we retreat a  
9 little bit, we thought that if we developed plans  
10 that had precise locations of the disturbance of  
11 the home, that we would bypass that application.

12 Q That's for this subdivision though?

13 A That's the one we're talking about.

14 Q Right. My question though was  
15 another subdivision, and I thought the assumption  
16 was that this subdivision is unique, which you  
17 said, and you stated the reasons why.

18 A (Nod)

19 Q Now I said, assuming that you don't  
20 have a unique situation, such as you addressed  
21 here.

22 A Right.

23 Q If you had preliminary approval for  
24 a subdivision, and I'm not talking about the  
25 Halley Estates II subdivision, would it be

1 David Zigler

2 typical for the person moving towards final  
3 approval to also apply for steep slope approval  
4 or permit?

5 A No, you can't, by the regulations of  
6 Pomona.

7 Q Where does it say you cannot do  
8 that?

9 A It's stated in the regulations that  
10 you cannot apply for a building permit until all  
11 improvements are in, satisfactory to the town or  
12 village engineer.

13 Q Well, I know that it may say that  
14 with respect to a building permit. But what  
15 about with respect to the steep slope permit?

16 A Steep slopes, as far as I  
17 understand, are a part of the application for a  
18 building permit.

19 Q So your assumption, then, is that  
20 you can't apply for a steep slope permit until  
21 you have a building permit.

22 MR. HASPEL: Well, until you have  
23 a building permit or until you're  
24 making application for a building  
25 permit?



1 David Zigler

2 A Application.

3 Q So until you make an application for  
4 a building permit, it's your assumption that you  
5 cannot apply for a steep slope permit; is that  
6 correct?

7 A That's the way Pomona has processed  
8 the steep slope application since we have been  
9 representing people.

10 Q And that's from the inception of the  
11 steep slope law?

12 A Right.

13 Q Which would have been when?

14 A Maybe three years ago. Time flies.  
15 Maybe four years ago.

16 Q Is there anything within the steep  
17 slope ordinance that --

18 A It would probably be early 2000,  
19 thinking about that.

20 MR. HASPEL: Eight years ago.

21 A I'm thinking when Vic Scatassa was  
22 here, and he's been retired for three years.

23 Q I gave you an exhibit before,  
24 Mr. Zigler, which says Chapter 119 of the Site  
25 Development Plan Review?

1 David Zigler

2 A Right.

3 Q Is there anything in there, in that  
4 document, which corroborates your assumption?

5 A Without studying it, I wouldn't  
6 know. They actually have a steep slope law, I  
7 believe.

8 MR. HASPEL: Again you used the  
9 word assumption. I think he used his  
10 experience. They are two different  
11 things.

12 MR. BENENATI: Well he used his  
13 firm's experience.

14 MR. HASPEL: Whatever it may be,  
15 it's just a different.

16 THE WITNESS: As far as I know,  
17 the steep slope is a village law and it  
18 wouldn't be found in this regulation.

19 MR. HASPEL: Anyway, to the  
20 extent that counsel is asking for  
21 interpretation of law, I would object.  
22 But I'm not going to stop Mr. Zigler  
23 from attempting to be a judge.

24 MR. BENENATI: I just asked if  
25 there was anything that supports his

1 David Zigler  
2 conclusion within here.

3 MR. HASPEL: I think again, his  
4 testimony was his experience, not his  
5 conclusion.

6 THE WITNESS: Without having an  
7 application for steep slopes in front  
8 of me, I wouldn't know. Usually a  
9 description of the procedure is on the  
10 application.

11 Q Let me show you.

12 A I believe the set of prints that I  
13 gave both of you did have the stamps.

14 MR. HASPEL: I think I looked at  
15 them.

16 Q I'm going to show you what has been  
17 marked as Exhibit 4. Take a look at that. I  
18 apologize about the copy, but that's the best we  
19 have (handing).

20 (December 22, 2006 letter from  
21 Toll Brothers to Briarwood Farms and  
22 Isaac Shiner was marked as Exhibit 4  
23 for identification.)

24 Q Exhibit 4 is a copy of a letter  
25 dated December 22nd, 2006 from Toll Brothers to

1 David Zigler

2 Briarwood Farms and Isaac Shiner. Have you seen  
3 that letter before, Mr. Zigler?

4 A I've seen, I don't know if I've seen  
5 this whole letter, but I've seen portions of it  
6 because I responded to some of these items.

7 Q Who asked you to respond to some of  
8 those items?

9 A That would be most likely  
10 Mr. Hershkowitz, and it could be either one or  
11 both.

12 Q What specifically were you asked to  
13 do?

14 A Let me see, one, four, five, six,  
15 seven, and I worked with somebody on three and  
16 eight.

17 Q Do you know when you had any  
18 discussion or the first discussion with  
19 Hershkowitz concerning the items in this letter?

20 A Probably December 23rd, 2006, very  
21 soon after that. Sometime very recently after  
22 that.

23 Q Were you given a copy of this  
24 letter?

25 A I don't know. You know, faxed to

1 David Zigler

2 me, I would probably say yes.

3 Q You are on the second page of the  
4 document, you're copied on it?

5 A I would say yes, because I know I've  
6 seen those items, so I must have had the entire  
7 letter.

8 Q Is that your fax number?

9 A Yes.

10 Q 845-634-5543?

11 A Yes.

12 Q Can you tell me what was the  
13 substance of the discussion that you had with  
14 Mr. Hershkowitz in reference to this letter? And  
15 I know you said you didn't know if it was either  
16 one, Israel or Joe.

17 A Yes, I guess the questions of the  
18 letter, why and how some of these questions or  
19 some of these concerns come up within this  
20 letter.

21 Q Did you undertake any studies or,  
22 you know, after you had this conversation with  
23 Mr. Hershkowitz, to address the concerns raised  
24 in the letter?

25 A Yes, because some of the items that

1 David Zigler  
2 were concerns in this were just things that as  
3 you process a subdivision you just do them a  
4 certain way, and nobody questions the way you're  
5 doing it. And some of the concerns in this  
6 letter, we could mitigate, you know, we could  
7 address and do it different, you know, if the  
8 owner or whoever was directing me to work on it,  
9 wanted it.

10 You know, you can skin a cat two  
11 different ways basically, and some of these  
12 questions we could have just addressed before  
13 final and been finished with them.

14 Q Okay. Were you present at that  
15 meeting on December 12, 2006 that's referenced  
16 within Exhibit 4?

17 A No, I don't think so. We've had  
18 meetings in here with Toll Brothers and sat down,  
19 but I think this letter was before that. I don't  
20 remember. But we've had meetings with Toll  
21 Brothers in here. So I don't know.

22 Q In those meetings, would you  
23 generally have meetings in your office or -- and  
24 this is with Toll Brothers, would they generally  
25 be here in your office?

1 David Zigler

2 A Yes, they came down, at least as I  
3 remember, twice, to discuss the process and some  
4 of their concerns with the way the maps were  
5 developed.

6 Q What were their concerns with  
7 respect to the maps as they were developed?

8 A I think they wanted to give us site  
9 specific homes to plot on the map, and there were  
10 some engineering concerns that they were  
11 interested in changing. I think we had a meeting  
12 in the office to make those changes, if they  
13 wanted to make them.

14 Q Did they have any concerns about  
15 getting final approval with respect to the  
16 subdivision?

17 A Concerns, what do you mean?

18 Q In terms of timing or the length of  
19 time it's taking?

20 A Everybody does, I mean, but  
21 unfortunately we're drug around by the planning  
22 board. Usually it doesn't take two years to get  
23 final approval from preliminary, but in this case  
24 you have to acquire permits. Everybody wants it  
25 tomorrow, but unfortunately permitting agents

1 David Zigler

2 don't move that fast.

3 Q During your discussion with  
4 Mr. Hershkowitz in reference to the December 22nd  
5 letter, did he talk about that prior meeting on  
6 December 12, 2006 at all?

7 A I guess you would have to say yes  
8 because we discussed this and it must have been  
9 what they discussed the 12th, I don't know. I  
10 didn't ask them. I would imagine if it's in a  
11 letter from the 22nd and from the discussion the  
12 12th, we did discuss it, yes.

13 MR. HASPEL: I think he's asking  
14 did you discuss your meeting, not the  
15 elements of the meeting.

16 THE WITNESS: You mean the  
17 elements when Toll Brothers were here?

18 MR. HASPEL: I'm just trying to  
19 interpret. If I'm going astray. I  
20 think his question is did you discuss  
21 the meeting.

22 THE WITNESS: Toll  
23 Brothers meeting --

24 MR. HASPEL: The one mentioned in  
25 here.



1 David Zigler

2 THE WITNESS: I guess other than  
3 discuss this memo from the meeting I  
4 would say no, we didn't precisely  
5 discuss December 12th.

6 Q And after the discussion with  
7 Mr. Hershkowitz, what, if anything, did you do in  
8 reference to the items raised in this December  
9 26th letter?

10 A Item one; item four, which we had  
11 already asked for a waiver; item five, which  
12 depicted on a map a fence around it; item six,  
13 we regraded the cul-de-sac; and item seven, we  
14 revised the drainage to what the Toll Brothers  
15 had discussed when they were here.

16 And item eight was, is a continuing  
17 fluctuating factor here. I mean, Pomona changes  
18 their mind about landscaping about once a month,  
19 and I think now we finally understand what they  
20 want.

21 Q Did you make any notes in respect to  
22 what you did with those items that you just  
23 mentioned?

24 A That would be referenced in these  
25 maps, most of them, the maps that I just showed

1 David Zigler

2 you.

3 Q The ones that we marked as Exhibit  
4 Number 8?

5 A Right.

6 Q And how long did it take you to  
7 implement those various things, with the  
8 exception of the number eight, the continuing  
9 fluctuating factor that you --

10 A A week or so, not long.

11 Q And how did you convey that those  
12 items were addressed to Mr. Hershkowitz, if at  
13 all?

14 A I think I sent a copy to Toll  
15 Brothers of the changes, and whenever I do that I  
16 always copy the client, meaning not with the  
17 maps, but with the memo transmitting the maps.

18 Q And the copies you're referring to  
19 are copies of the maps?

20 A Right.

21 Q Are the maps identified -- are there  
22 changes identified in each map? I know each map  
23 has a numbered sequence, so if you change  
24 something, for example, on Exhibit 7, is that  
25 change indicated?

1 David Zigler

2 A No, that's a good question, but  
3 unfortunately the process has become so confused  
4 that you really can't do that on the maps. But I  
5 understand it. The process just takes so long  
6 and you change maps so many times that you would  
7 end up with all these footnotes. So we don't.  
8 When we change one page, we change the date on  
9 all sheets. So they are referenced, because when  
10 the planning board references a set of plans,  
11 they represent by reference the date on the front  
12 sheet?

13 Q So basically, if you go to the  
14 planning board, you give them the current plans,  
15 the plans that are current?

16 A Right.

17 Q After you sent those copies to Toll  
18 Brothers, did you get any response?

19 A I don't know, we had several  
20 questions back and forth and I don't know if that  
21 was the last or not. I thought there was other  
22 questions. We always got a response from them,  
23 to tell you the truth, yes.

24 Q Was that a written response or  
25 something else?

1 David Zigler

2 A I believe there was another memo  
3 after this. I'm not too sure.

4 Q Would the memo have been addressed  
5 to you specifically or --

6 A No, I might have been copied on a  
7 memo.

8 Q Do you have a file with respect to  
9 all correspondence that you received from Toll  
10 Brothers?

11 A I would say yes. Because I just  
12 remember a few things that this one doesn't  
13 detail, so I would have to say there might be  
14 another memo after this.

15 Q I know that we came to your office  
16 and left copies. Was that your entire file with  
17 respect to the subdivision?

18 A Yes.

19 Q Generally, how do you keep that  
20 file?

21 A I try to keep it by date, and it  
22 just doesn't work. Sometimes now we try to keep  
23 them by process, in other words, preliminary,  
24 final, off-site permits, so on and so forth.  
25 Unfortunately, like everything else, the one with

1 David Zigler

2 the least experience files documents, so you  
3 could find them anywhere.

4 Q With respect to like for example  
5 your preliminary file, would that be all the  
6 documents up to preliminary approval or anything  
7 relating to preliminary approval or preliminary  
8 approval as of the date and after, or what?

9 A No, the preliminary would be after  
10 preliminary approval, because that's when you  
11 start for permits, and that's like the most  
12 important process for the step towards final. So  
13 the preliminary approval folder would have things  
14 after preliminary.

15 Q Okay. And when would it become the  
16 final?

17 A Whenever that planning board votes  
18 for it, the application.

19 Q So is there a file marked "Final  
20 Approval?"

21 A Yes, because I like to think --

22 Q You're optimistic?

23 A Yes. It's turning very yellow.

24 Q Is there anything in it?

25 A Yes, it probably has my submission

1 David Zigler

2 for final and other letters that were misfiled.

3 Q With respect to any written  
4 correspondence that Toll Brothers may have sent,  
5 with respect to you sending them the copies of  
6 the map implementing the changes, where do you  
7 think you would have filed that?

8 A I don't know, because they actually  
9 came down, their engineer, their project planner,  
10 and we discussed a few things and then they sent  
11 us. So it would be one of the files, any letters  
12 we would get.

13 Q So did they come after you had this  
14 conversation with Mr. Hershkowitz --

15 A Sometime during that -- I know I  
16 just stepped on you -- but sometime during that  
17 process, yes, I don't remember. That's two years  
18 ago.

19 Q Right. So sometime after you had  
20 your discussion with Mr. Hershkowitz up to the  
21 time you sent him the copies of the revised maps,  
22 Toll Brothers came down and you had a meeting  
23 with them?

24 A Yes.

25 Q Do you recall who came down from

1 David Zigler

2 Toll Brothers?

3 A No. I don't remember your name and  
4 you just came in. No, it was three different  
5 fellows. One was a vice president, one was a  
6 project manager, and another one was just almost  
7 like a map reviewer.

8 Q Can you tell me what you guys  
9 discussed at that meeting?

10 A They discussed concerns and how they  
11 would like to change items that we had submitted,  
12 which were, you know, this is not unusual. And  
13 how possibly could speed up the process as they  
14 developed the property.

15 Q And were maps reviewed during that  
16 time?

17 A Yes, a map equal to what I just  
18 showed you.

19 Q And then after that meeting you made  
20 the revisions and submitted the revised map; is  
21 that correct?

22 A I made revisions, some of them just  
23 an overdraw as we call it, and sent them copies  
24 of it to see if that's what they wanted to do.  
25 You know, if they are going to purchase the

1 David Zigler

2 property, I would really try to make them maps --  
3 it's hard to explain, but you are trying to make  
4 the maps work with the type of homes they were  
5 going to build. So it was very important that  
6 they come down and discuss home types in case it  
7 exceeded that footprint that we showed.

8 Q Was there a discussion about home  
9 types?

10 A Yes, they told me that they had  
11 several homes in mind for the project, several  
12 styles, footprints.

13 Q Were those footprints implemented on  
14 any of the maps?

15 A No.

16 Q When would they have been  
17 implemented, if at all?

18 A Whenever they would send me  
19 something, I would call up Mr. Hershkowitz and  
20 say I have precise homes to put on this map, do  
21 you want me to do it? But I never received any  
22 footprints from him that I remember.

23 Q The footprints we saw in that map  
24 identified as C-1, what is the size of that  
25 footprint?



1 David Zigler

2 A I don't know, we just took a typical  
3 home that the Herskowitzes build and we made it a  
4 little bit bigger, to be safe.

5 Q When you say a little bit bigger,  
6 what would be the square foot or however you  
7 would measure it?

8 A I don't know. I would have to  
9 measure --

10 MR. HASPEL: Just again for  
11 clarity purposes, are you talking about  
12 the square feet of the footprint or the  
13 square feet of the home? Because it  
14 could be a --

15 MR. BENENATI: I don't know how  
16 it's measured, so.

17 MR. HASPEL: That's why I'm  
18 asking.

19 A It's measured in footprint, because  
20 we don't know what rooms, it could be a ranch,  
21 whatever.

22 Q Sure.

23 A I think he was talking mid 3,000  
24 footprint.

25 Q Could that accommodate a certain

1 David Zigler

2 square foot size home?

3 A Right.

4 Q What?

5 A I don't remember now. That's a long  
6 time ago.

7 Q Was that in line with what Toll  
8 Brothers had planned?

9 A I don't know, I'd never seen it.  
10 They showed me a picture. I've never seen a set  
11 of their plans.

12 If you work with a large company  
13 like Toll Brothers or Ginsberg now, I have three  
14 or four different styles that they'll use within  
15 that development. They give it to you and then  
16 you try to execute it on the plans. You know, so  
17 when they hang it up on the wall, they have the  
18 styles of their homes that fit on the lots. We  
19 never got that far with this application.

20 Q Okay. What about item number three  
21 on the letter, Exhibit 4?

22 A Yes.

23 Q Did you have any discussions with  
24 Mr. Hershkowitz about that?

25 A Absolutely, and with Toll Brothers

1 David Zigler

2 about it, just like we discussed today.

3 Q Let's just stick with your  
4 conversation with Mr. Hershkowitz, what did he  
5 and you discuss?

6 A Basically, the same things that we  
7 just previously discussed. I was under the  
8 impression by the process that we had went  
9 through, average density and detailing lot  
10 disturbance far more descriptive than any project  
11 in Pomona, that we would not be required to go  
12 for steep slopes.

13 But I had not, you know, as this  
14 memo says, Pomona is notorious for changing their  
15 minds. I still haven't seen proof we have to or  
16 don't have to.

17 Q With respect to item number three,  
18 it says "Resolution of Preliminary Approval.  
19 Condition number 7. Lots that are subject to  
20 steep slope requirements will be subject to  
21 planning board site plan review."

22 A Right.

23 Q What did that mean to you?

24 A It means to me that somebody is  
25 thinking we have to go back to the planning board

1 David Zigler

2 for steep slopes. But also, they gave me  
3 permission to disturb steep slopes. So at this  
4 point I was a little confused.

5 Q The "they" that gave you permission  
6 was the planning board; is that right?

7 A Right, through that preliminary, and  
8 through that drawing number nine, I believe it  
9 was, that I showed you.

10 MR. HASPEL: Nine was the one  
11 that had the disturbance notes.

12 THE WITNESS: Right.

13 Q Did you convey that statement to  
14 Mr. Hershkowitz?

15 A Yes, many discussions about it, and  
16 with Mr. Edwards, the attorney.

17 Q Mr. Edwards, is that the attorney  
18 for whom?

19 A Hershkowitz.

20 Q Okay. And what was their response  
21 when you told them your assumption that you had  
22 approval, preliminary approval, and that drawing  
23 number nine referenced that?

24 A He said, good, maybe we don't have  
25 to go.

1 David Zigler

2 Q What about with respect to after  
3 you've received this letter with respect to  
4 number three, was that your assumption unchanged  
5 with respect to the steep slope application?

6 A My assumption of confusion has never  
7 changed.

8 Q Right. So it hasn't been resolved?

9 A Basically, no, it's still open.

10 Q And what do you feel is going to  
11 resolve the issue?

12 A I think either some kind of letter  
13 from Doris Ullman or sometimes we would apply for  
14 steep slopes and they would say that we didn't  
15 need the steep slope application, it could come  
16 as easy as final resolution or it could come when  
17 we apply for steep slopes.

18 Q And you would do that when you apply  
19 for the building permit, correct?

20 A Right.

21 Q And that would be after final  
22 approval, correct?

23 A After final approval and after all  
24 the improvements are in the ground.

25 Q Is there anything preventing you

1 David Zigler

2 from applying before that time, after the  
3 improvements are in the ground? For the steep  
4 slope permits.

5 A After the improvements are accepted  
6 you could apply for a building permit on all the  
7 lots, nothing stopping you.

8 Q Could you also apply for the steep  
9 slope permit?

10 A Yes, at the same time, for all the  
11 lots.

12 MR. HASPEL: Could we take a  
13 two-minute break?

14 MR. BENENATI: Sure.

15 (Brief recess)

16 (January 22, 2007 letter to  
17 Briarwood Farms and Donald Tirschwell  
18 from Toll Brothers was marked as  
19 Exhibit 5 for identification.)

20 BY MR. BENENATI:

21 Q I'm going to show you what has been  
22 marked as Exhibit Number 5 and it's a letter from  
23 Toll Brothers dated January 22nd, 2007 to  
24 Briarwood Farms and Donald Tirschwell. And when  
25 you are done looking at it, just let me know

1 David Zigler

2 (handing).

3 A Oh, I see, this is reflected back to  
4 those items. I need that letter. All right,  
5 I've seen this.

6 Q Are you copied on this letter.  
7 Mr. Zigler?

8 A Yes.

9 Q Did you have a conversation with  
10 Israel Hershkowitz sometime after January 22nd or  
11 thereabouts?

12 A I would have to say yes.

13 Q Do you recall a conversation with  
14 him?

15 A Yes. And most likely Mr. Tirschwell  
16 was involved.

17 Q Did you have a meeting? Was it a  
18 meeting or a telephone conversation or something  
19 else?

20 A That would be hard, because with  
21 Mr. T, Mr. Tirschwell, usually it's done over the  
22 phone. But he comes by, it could have been  
23 either.

24 Q Did you all three have a  
25 conversation, like as a meeting, meaning you,

1 David Zigler

2 Mr. Hershkowitz and Mr. Tirschwell?

3 A Yes, absolutely.

4 Q Do you know what was discussed at  
5 that meeting?

6 A If I remember correctly, every item  
7 here, yes.

8 Q Okay. And were you asked to do  
9 anything as a result of that meeting?

10 A Item six, yes, and item seven.

11 Q So item six refers to the --

12 A Steep slope on the cul-de-sac, we  
13 revised that.

14 Q And item seven refers to existing  
15 drainage swail along the rear property line of  
16 lots 26 and 27?

17 A Right, we revised that also.

18 Q And you revised that on the plans,  
19 correct?

20 A Right.

21 Q Did you take any other action as a  
22 result of that meeting?

23 A Not that I remember, no.

24 Q Did you discuss each one of the  
25 issues raised in the January 22nd, 2000 letter?



1 David Zigler

2 A Yes, I believe we did, yes.

3 Q Do you recall what was said about  
4 each item? You can go down the line, if it's  
5 helpful, in Exhibit 5.

6 A Item two is the condition about  
7 repairing Klingher Court. And it was kind of  
8 discussed back and forth with the Village  
9 Engineer, and they just, the Village of Pomona  
10 wanted security on it, meaning if it was  
11 destroyed by the contractor, somebody would have  
12 to fix it.

13 Q Do you know how that resolved, if at  
14 all?

15 A I believe by the last discussion at  
16 the workshop there was going to be security held  
17 for a Klingher Court topping if it's destroyed by  
18 inspection of the Village Engineer, if it's been  
19 destroyed, that the contractor will have to  
20 repave Klingher Court. I think that's what's  
21 going to happen, yes. It seemed to solve that.

22 Q What about after your meeting with  
23 Mr. Hershkowitz and Mr. Tirschwell, were you  
24 asked to do anything with respect to item number  
25 two?

1 David Zigler

2 A No, not really?

3 Q Were you asked to give an opinion  
4 about the issue in number two?

5 A Opinion of what?

6 Q Whether Toll Brothers' demand was  
7 reasonable or unreasonable.

8 A I just know of it, either way it's  
9 not my decision, it's either the Village of  
10 Pomona or Toll Brothers or somebody.

11 Q But you were asked to comment on it,  
12 correct?

13 A They asked me to comment on it  
14 because I'm the one that goes to the planning  
15 board, and I said yes, we're aware that if  
16 Klingher Court, something happens, construction  
17 destroys the topping on Klingher Court, somebody  
18 is going to have to fix it, yes.

19 Q Did you offer an opinion as to  
20 whether it should be Toll Brothers or somebody  
21 else or?

22 A No.

23 Q What was your advice to  
24 Mr. Hershkowitz and Mr. Tirschwell in reference  
25 to item number two?

1 David Zigler

2 A If you ever had a meeting with  
3 Mr. Tirschwell, you don't offer any advice, you  
4 listen. So I didn't offer any advice.

5 Q I never had a meeting with  
6 Mr. Tirschwell.

7 MR. HASPEL: I've had many  
8 meetings with him.

9 THE WITNESS: You're on the same  
10 level.

11 MR. HASPEL: He takes my advice.

12 Q Did you agree or disagree with the  
13 last two sentences within item two on the first  
14 page?

15 A I really, when things don't pertain  
16 to me, I don't even give it a second thought. So  
17 I have nothing to do with that.

18 Q So as far as you were concerned, it  
19 was an item that --

20 A I couldn't give a flying, you know  
21 what.

22 Q So that's something that had to be  
23 resolved between Toll Brothers and others?

24 A Yes.

25 Q Okay. What about with respect to

1 David Zigler

2 item number three?

3 A It's of concern because of previous  
4 applications. Always approved though. The  
5 planning board can sometimes ask for things that  
6 you would not be aware of or you would not expect  
7 to be asked for. So it is a concern, and that's,  
8 you know, but we're developing a set of plans  
9 that hopefully would mitigate the steep slope  
10 concerns.

11 Q And during the meeting with yourself  
12 and Mr. Hershkowitz and Mr. Tirschwell, what did  
13 you advise about item number three which pertains  
14 to the steep slope ordinance?

15 A As I explained here to you, our  
16 entire set of plans had features in it that would  
17 either speed the process up when you applied for  
18 a steep slope law or we would not even have to do  
19 it. So we thought that, you know, we had  
20 mitigated it to a point that if it became needed  
21 to apply, that we would be a one-month process.

22 Q Did you offer any advice about  
23 actually applying for the steep slope permits?

24 A Not any more than I gave you. We  
25 can't apply -- no.

1 David Zigler

2 Q Was there any further discussion  
3 between the three of you in reference to item  
4 number three that you and I hadn't discussed  
5 right now?

6 A No. I think we've discussed  
7 everything that had gone on in that conversation,  
8 definitely.

9 Q Did you spend any more time on item  
10 number three than any of the other items in the  
11 letter or --

12 A Absolutely, I believe I'm finished  
13 with all the rest of the items. Item three we're  
14 still talking about, so I would say yes.

15 Q What about then though?

16 A Absolutely, I'm dealing with  
17 Mr. Hershkowitz, and he definitely would not, you  
18 know, once you get through a planning board you  
19 don't want to go back to them because you could  
20 have five different people sitting there. So it  
21 is a concern.

22 Q What about with respect to item  
23 number six?

24 A I thought that was a little bit of a  
25 stupid response from Toll Brothers.

1 David Zigler

2 Q In what way?

3 A Because they asked us to change the  
4 grade and then after we changed the grade they  
5 said it was an unacceptable condition, so don't  
6 ask me, you know, that aggravates me. Don't ask  
7 me to change something and then tell me you don't  
8 like it.

9 Q Did you guys have a discussion, you  
10 guys, Hershkowitz, Tirschwell and yourself, with  
11 respect to item number six?

12 A No, I had a condition from the  
13 Village Engineer where I had to change the grade  
14 and Toll Brothers knew that, so we changed it and  
15 we actually, whether they think it's unacceptable  
16 or not, I had to change the grade. They wanted  
17 the grade changed, Toll Brothers, and I did it  
18 and they said it's unacceptable. I think that's  
19 unacceptable, in my view.

20 Q Was that change discussed in your  
21 meeting after receipt of the December 22nd  
22 letter?

23 A Several times after that, because it  
24 changes the road, yes. It changed our waterline,  
25 yes.

1 David Zigler

2 Q How many discussions or meetings did  
3 you have about item number six after receipt of  
4 the December 22nd letter?

5 A I would just say a couple of times  
6 because when you change something, a set of  
7 plans, it might aggravate another situation and  
8 then you have to say well, you know, I have this  
9 situation now, so I would say a couple of times.

10 Q Do you know how it resolved as a  
11 result of those discussions with Toll Brothers  
12 and yourself regarding item number six, do you  
13 know how it resolved prior to January 22nd,  
14 between you?

15 A As far as I'm concerned, it's  
16 resolved, because the Village Engineer accepted  
17 it. So that's the final stamp of approval.  
18 Whether I like it, you like it, or anybody likes  
19 it.

20 Q When did the Village Engineer accept  
21 it?

22 A By not writing a comment, I believe  
23 that I will receive a final, I will not receive  
24 that comment again that the cul-de-sac is too  
25 steep. He verbally accepted it but I have to

1 David Zigler

2 wait until the final now.

3 Q After receipt of the December 22nd,  
4 letter, you said you revised the plans, correct?

5 A Yes.

6 Q Did you revise the cul-de-sac issue  
7 that's raised in the January 22nd letter as item  
8 number six?

9 A Yes, we went from 10 percent to  
10 4 percent.

11 Q Okay. Were those maps submitted to  
12 the Village Engineer for his review before  
13 January 22nd, 2007?

14 A Before? It's possible, I don't  
15 know. During the process of -- you have to  
16 understand, during the process of dealing with  
17 these Toll Brothers' letters, I'm going back and  
18 forth with the engineer to try to solve all the  
19 outstanding issues.

20 So did it happen between December  
21 and January? I don't know. But within the span  
22 of six months covering those two months I can  
23 guarantee that he's seen them. We've been back  
24 for final, and since that preliminary resolution,  
25 we've been back maybe three or four times. So



1 David Zigler

2 yes, he's seen them.

3 Q What about the item number seven as  
4 raised in the January 22nd letter, did you have a  
5 conversation with Mr. Tirschwell and Mr.  
6 Hershkowitz regarding item number seven?

7 A Yes, we made a significant change to  
8 the plans to eliminate that easement.

9 Q That's after you received the  
10 January 22nd letter?

11 A During that time from December to  
12 January, actually, that process took a little bit  
13 longer than that, because I had to go back to the  
14 Village Engineer and ask him if our proposed  
15 revision would be acceptable and he didn't have a  
16 problem with it. So I would have to say that it  
17 went more than the two months that we're talking  
18 about.

19 Q On the revisions, did that  
20 incorporate easement?

21 A No, we eliminated easement in those  
22 concerned lots.

23 Q Okay.

24 A We revised the drainage to eliminate  
25 the easements and the area of concern.

1 David Zigler

2 Q So I guess based on the item seven  
3 as articulated in the January 22nd letter, it  
4 says here, "We do not believe omitting these lots  
5 from the purchase is an acceptable solution. We  
6 have not received any information nor  
7 clarification on your other two proposals and  
8 cost estimates (for sellers proposed  
9 reimbursement) to assess the merits." Did the  
10 first --

11 A We made several revisions, and what  
12 they are saying here is the first couple of  
13 revisions they did not like. The final revision  
14 which was after this date totally removed the  
15 easements?

16 Q Okay.

17 A Then I had to go back to the Village  
18 Engineer and say we're thinking about running the  
19 drainage this way, and show him an alternate  
20 plan. He agreed and then I had to change the  
21 map.

22 So this item number seven here does  
23 not really reflect as the map stands today.

24 Q So it's been since revised to, --

25 A -- eliminate the easements of their

1 David Zigler

2 concern.

3 Q And that was resolved when?

4 A I don't know. Maybe a year ago.

5 Q Okay. Item number eight, did you  
6 have a conversation with Mr. Tirschwell and  
7 Mr. Hershkowitz concerning item eight?

8 A Yes, and actually it had to do with  
9 the landscaping, and we thought we had, let's  
10 say, an approved landscaping generic plan for  
11 each lot. And I guess by our meeting of the  
12 workshop of this April, they are still not  
13 totally satisfied. But this one is still open, I  
14 guess.

15 Q What about at the time of the  
16 letter, what was the state of affairs with  
17 respect to the landscaping issue?

18 A It's exactly the same as today. We  
19 made no revisions. But the board has not  
20 committed to accepting that plan as a designated  
21 generic landscaping plan.

22 Q That generic landscaping plan was  
23 contained on one of the drawings?

24 A Yes.

25 Q That comprises Exhibit 8?

1 David Zigler

2 A Right. One of the plans, yes.

3 Q It says in item eight, "Any  
4 landscaping requirements would need to be  
5 specified and reviewed and approved by us prior  
6 to closing." Is that standard procedure and  
7 practice with respect to the landscaping issue?

8 A I wouldn't know that, I wouldn't  
9 know anything about prior to closing. I know  
10 prior to final approval, and that's dealing with  
11 the planning board.

12 Q I'm sorry?

13 A I deal with the planning board. I  
14 wouldn't be privy to what they discuss before  
15 closing this contract.

16 Q Did you have any advice as to  
17 whether or not that condition was reasonable or  
18 unreasonable under the circumstances?

19 A No, it doesn't pertain to me.

20 Q After that meeting, did  
21 Mr. Hershkowitz or Mr. Tirschwell advise you to  
22 do anything with respect to the items raised in  
23 the January 22nd letter?

24 A The only thing that continued for  
25 any length of time had to be that drainage, item

1 David Zigler

2 seven. And it just took us time to come up with  
3 an alternate design, and it took time to have the  
4 Village Engineer agree to it. So I would say  
5 yes.

6 Q Anything else?

7 A Not that I remember.

8 (January 30th, 2007 letter from  
9 Donald Tirschwell to Toll Brothers was  
10 marked Exhibit 6 for identification.)

11 Q I'm going to show you Exhibit Number  
12 6 and ask you to take a look at that (handing).  
13 Exhibit 6 is a letter from Donald Tirshwell to  
14 Toll Brothers dated January 30th, 2007.

15 A Right.

16 Q When you are done, let me know.

17 A Pretty much finished.

18 Q Had you ever seen this letter  
19 before?

20 A Yes.

21 Q When did you see it?

22 A Probably around January 30th.

23 Q Did you receive a copy of the  
24 letter?

25 A I think I did, yes.

1 David Zigler

2 Q Do you know who sent it to you?

3 A Mr. T., Tirschwell.

4 Q Do you know why he sent it to you?

5 A Because he likes to inundate our fax  
6 machine with junk. He sends everything, yes. He  
7 probably just sent it to me so I was aware of  
8 some of the items on it.

9 Q Did he direct you to do anything  
10 with respect to any of the items raised in his  
11 letter or any prior letters from Toll Brothers?

12 A Yes, the drainage. I think at that  
13 time we were still working on the drainage, item  
14 number seven.

15 Q Okay. You were asked to provide  
16 input prior to Mr. Tirschwell preparing this  
17 letter?

18 A I would have to say yes, because it  
19 became an objection to the way it was designed.  
20 So I would have to say he did ask us to come up  
21 with why we did it, you know, explain to him why  
22 we designed it like that and try to do an  
23 alternate design. I would have to say yes.

24 Q When you say design it, are you  
25 referring to what?

1 David Zigler

2 A The drainage line, Toll Brothers had  
3 trouble with the drainage line. Do you want me  
4 to show you?

5 Q No. That's one item among several.  
6 What about the others?

7 A The easement was, the problem was  
8 the easement covered a drain line, so if we could  
9 move the drain line then we wouldn't have a  
10 problem with easement. So they are the same  
11 thing.

12 Q The input that you offered to  
13 Mr. Tirschwell, was the that over the phone?

14 A No, I had a plan, I might have faxed  
15 it him, he could have stopped in, it could have  
16 been either. He is always in here so I would  
17 have to say most likely he was here.

18 Q Did you have any writing with  
19 respect to --

20 A Writing to him?

21 Q Like a note, you know, memo or  
22 something else?

23 A No. I probably faxed it to him and  
24 I said stop by. You know, I fax sketches out, so  
25 I probably faxed him a sketch and another idea of

1 David Zigler

2 changing the drainage. And he probably stopped  
3 by when he went to drop off his mail, which he  
4 usually does.

5 Q So is it fair to say your only  
6 involvement with input to Mr. Tirschwell was with  
7 respect to item seven?

8 A I believe so.

9 Q Do you want to take a look at the  
10 letter to be sure?

11 A Yes, after you ask me that question.

12 Q Why don't we go down and identify  
13 the items and I'll ask you whether you provided  
14 any input. With respect to item number two,  
15 listed or contained in the January 30th letter  
16 from Mr. Tirschwell, did you give Mr. Tirschwell  
17 any information, advice, et cetera, relative to  
18 item two?

19 A Only as he states the note and the  
20 concern on page one, of drawing number one was  
21 the note, that was the only thing that we  
22 offered.

23 Q What note are you referring to,  
24 Mr. Zigler?

25 A Note number 31 that's described



1 David Zigler

2 here, "The existing driveway on lot 13 shall be  
3 utilized for construction equipment, supplies and  
4 workers from Carlyle Road into the site," meaning  
5 Halley II.

6 Q Um-hm.

7 A "Project sign prohibiting delivery  
8 at Klingher Court shall be posted at Klingher  
9 Court and Call Hollow Road. That's the only  
10 discussion I had with him.

11 Q And what is your understanding as to  
12 why Mr. Tirschwell is citing note 31?

13 A Well, because of the topic of  
14 Klingher Court, if somebody happens to come  
15 through Klingher Court and gouges it to the  
16 degree that the Village Engineer found it to be  
17 unacceptable, somebody who is a contractor on the  
18 job would have to repave Klingher Court. So  
19 that's what the whole deal is. If you come in,  
20 per se, as the planning board wants you to on lot  
21 13, you will not mess up Klingher Court.

22 Q Um-hm.

23 A And that's what the village wanted,  
24 nobody traveling on Klingher Court. But I'm not  
25 the policeman and they're not the policeman, and

1 David Zigler

2 one person can mess up a road.

3 Q Was your plan unchanged? Because  
4 this is referring to a plan which your firm --

5 A No, that note has been on there  
6 since the SEQR process and the FEIS, because I  
7 was part of the SEQR process.

8 Q What is the SEQR?

9 A State Environmental Quality Review,  
10 and this has had a scoping and this went the full  
11 nine yards of SEQR.

12 Q What about item number three, did  
13 you offer any advice with respect to item number  
14 three?

15 A No. Mr. Tischwell is pretty much  
16 aware of the steep slope law.

17 Q Did he advise you at all as to how  
18 he was going to address item number three in his  
19 letter?

20 A I don't think so, no. I don't  
21 remember, no.

22 Q Did he ask you to comment on any  
23 draft letter that he prepared?

24 A Yes, he could have, he has done  
25 that. I don't remember this one, but yes, he

1 David Zigler

2 could have.

3 Q If he asked you to comment on a  
4 draft letter, would you have a copy of the draft?

5 A No, that would have been something I  
6 discarded a long time ago. Drafts are garbage.

7 Q Is it your custom and practice if  
8 you comment on a draft to discard it?

9 A Absolutely.

10 Q But you don't have a specific  
11 recollection of offering comments to the draft  
12 letter?

13 A I would say that I probably did  
14 because some of these items were outstanding,  
15 even as he wrote that, like this drainage, so I  
16 would imagine he fired it off to me as a draft  
17 copy to look at, yes.

18 Q Do you remember making any  
19 recommendations relative to item number three in  
20 the draft copy?

21 A No. It's just as he states here and  
22 John Edwards told me, it's a village law, so if  
23 it's required, it's required. I'm trying to get  
24 around it, but law is a law. Working hard.

25 Q Do you think you'll get around?

1 David Zigler

2 A I believe that I'm going to have it  
3 in such a form that if you're required to go for  
4 a steep slope application it will be in a  
5 different scope, because some of the process will  
6 be eliminated by the description on our maps.

7 Q And some of the problems you're  
8 referring to is what, the grading?

9 A Grading, public hearing. If you own  
10 all the lots, if whoever buys this, I would say,  
11 listen, if the planning board states that there  
12 is a steep slope on eight lots, let's go en masse  
13 for the eight lots at one time while you control  
14 the adjoiners.

15 Q What about item number six, did you  
16 offer any comment to item number six with respect  
17 to Mr. Tirschwell's letter?

18 A No, he can write anything he wants  
19 on that. If the Village Engineer wants a grade  
20 change, I change a grade.

21 Q Item number seven refers to the  
22 drainage issue that we discussed at length?

23 A Right.

24 Q What about item number eight?

25 A It's still open, I don't have any --

1 David Zigler  
2 unfortunately it's not very black and white, the  
3 answer to that, so it's still open until we  
4 receive final approval.

5 Q With respect to the items raised in  
6 both the January 22nd letter from Briarwood  
7 Farms, which is Exhibit Number 5, and the items  
8 in Mr. Tirschwell's letter, which is Exhibit 6,  
9 which items are still open as of today?

10 A Steep slopes and landscaping.

11 Q So that would be items three and  
12 eight?

13 A Right.

14 Q And when did item two no longer  
15 become an issue?

16 A I think when Mr. Edwards offered to  
17 put security down for the topping of Klingher  
18 Court?

19 Q When was that, do you know?

20 A I don't know, sometime after this  
21 development of concern here.

22 Q So sometime in 2007?

23 A Yes, I would have to say.

24 Q And that would be recorded  
25 somewhere in the meeting minutes of the planning

1 David Zigler

2 board or --

3 A No, because after we received  
4 preliminary, we've been to the workshop more than  
5 we have been to the planning board. So I would  
6 say that would be an item discussed with the  
7 engineer. Then if the engineer finds it and the  
8 attorney at the workshop finds it acceptable,  
9 then they would discuss it as a recommendation to  
10 the planning board.

11 Q So that's a recommendation at the  
12 next planning board meeting or some other point  
13 in time?

14 A Right.

15 Q How many workshops did you have?

16 A Since preliminary?

17 Q Yes.

18 A I would have to say at least four or  
19 five.

20 Q And those workshops are generally  
21 designed to do what?

22 A Eliminate comments established  
23 during preliminary.

24 Q Prior --

25 A Yes, and you just keep wearing them

1 David Zigler

2 out basically, changing the map and wearing them  
3 out.

4 Q So if you are at a planning board  
5 meeting and they have concerns, all the concerns  
6 are identified and then prior to the next  
7 planning board meeting you have a workshop? Or  
8 there could be a workshop.

9 A You revise the maps and you will  
10 have a workshop. But in this case we were going  
11 for final, so we were revising the maps in some  
12 slight form, or maybe the health department  
13 wanted a revision, and I would go to a workshop  
14 and say listen, the health department wants a  
15 revision, this is what we're doing.

16 Q How many times did you apply for  
17 final approval?

18 A You only apply once.

19 Q Okay. And that's when all the  
20 issues are addressed?

21 A In my light they are all addressed,  
22 but the planning board, after they review it,  
23 they could come up with a different issue. It's  
24 not unusual to have something crop up before  
25 final approval.

1 David Zigler

2 Q Or at the final approval they can  
3 have conditions?

4 A Absolutely.

5 Q What about item number seven, when  
6 did that resolve?

7 A That's the drainage issue?

8 Q Yes, with respect to lots 26 --

9 A About three weeks ago.

10 Q 26, 27, 28?

11 A Three weeks ago.

12 Q Was that at a workshop that resolved  
13 or something else?

14 A Out in a field with our neighbors.

15 Q Okay.

16 A The question of the drainage and the  
17 location within those lots was just solved three  
18 to two weeks ago when we had a field meeting with  
19 the neighbors.

20 Q Neighbors, you mean from the  
21 surrounding subdivisions?

22 A Yes, our adjacent neighbors that are  
23 contiguous to the property lines.

24 Q So somebody raised an issue at the  
25 planning board meeting or --



1 David Zigler

2 A No, it had just been discussed that  
3 everybody thought there was a better way of  
4 addressing the drainage but nobody had the  
5 answer. And when we did come up with the answer,  
6 the village thought it was important for us to go  
7 out and meet with the neighbors, and we did that,  
8 me and Mr. Corlis.

9 Q How long did that process take?

10 A Half an hour.

11 Q Not to meet with the neighbors but  
12 to get it all set up to whereby you would meet  
13 with the neighbors to have it resolved?

14 A Took over a year. I notified them  
15 by mail, I notified the village, and when we had  
16 the public hearing for final, both neighbors came  
17 and we set a time up then.

18 Q Item eight you said is still open,  
19 right?

20 A Yes.

21 Q And is that item, would that be  
22 resolved at the final hearing or prior to the  
23 final hearing or both?

24 MR. HASPEL: Again, I will object  
25 to form only because there may be

1 David Zigler

2 different concepts of resolved. Just  
3 to reinterpret what you said, something  
4 may be resolved between engineers but  
5 not officially resolved until signed  
6 off. So there are two resolveds.

7 A He is right, until the planning  
8 board votes, it's not resolved.

9 Q I was going to say when would it be  
10 a closed issue, but that's the same response?

11 A Right. Especially the landscaping,  
12 because it's not defined. If something is  
13 defined and you answer in a defined manner,  
14 everybody thinks it's over. But the landscaping  
15 is not a defined answer.

16 Q When did you first become aware that  
17 there was this dispute between Briarwood Farms  
18 and Toll Brothers?

19 A I guess when Toll Brothers came down  
20 and sat down and told me that they would like to  
21 make changes to the plans.

22 Q Was that after they sent the  
23 December 22nd, letter?

24 A Yes, sometime in that term, yes.

25 Q Were you ever advised from anyone

1 David Zigler

2 from Briarwood Farms or Mr. Tirschwell that there  
3 was an issue between Briarwood Farms and Toll  
4 Brothers?

5 A Yeah, by that letter I received from  
6 Toll Brothers there was an issue, yes.

7 Q Did you ever speak to  
8 Mr. Hershkowitz about what was going on between  
9 Briarwood Farms and Toll Brothers?

10 A Yes, because we discussed this I  
11 would say yes, I did.

12 Q What did he say?

13 A He said "Answer these questions,  
14 Dave, so we can solve it."

15 Q Is that all he said?

16 A Yes, get it done. That's my mission  
17 in life, just get it done.

18 Q What about Mr. Tirschwell, did he  
19 advise you of any dispute between Briarwood Farms  
20 and --

21 A Nothing other than these letters. I  
22 don't know if there was any other things  
23 disputed, but I mean, this is pretty much of a  
24 disagreement right here. So I would say that I  
25 was aware of it, yes. And they both came in to

1 David Zigler

2 discuss it with me and set up meetings so I could  
3 meet with Toll Brothers. So I would say I was  
4 aware of something, yes.

5 Q What were those meetings designed to  
6 do?

7 A Solve these problems.

8 Q And did they ever solve them?

9 A No, because when I did solve them to  
10 what I thought solved the problems, I never heard  
11 again from Toll Brothers. And I called them, I  
12 actually called to go up there and meet with  
13 them. And I did once but that kind of just fell  
14 through.

15 Q You did go up to see Toll Brothers  
16 you said once?

17 A Yes.

18 Q When was that?

19 A If I had my calendar book, I could  
20 look it up.

21 Q Was that after --

22 A During this process.

23 Q During the process?

24 A Yes.

25 MR. HASPEL: Off the record.

1 David Zigler

2 (Brief recess)

3 BY MR. BENENATI:

4 Q I'm going to show you what has  
5 previously been marked as Exhibit B, and ask you  
6 to take a look at that (handing). This is  
7 entitled Chapter 118, Subdivision of Land, and  
8 this was taken from the Village of Pomona  
9 website.

10 A Right.

11 Q Are you familiar with this chapter?

12 A Yes.

13 Q And when I say --

14 A Generally familiar with it, yes.

15 Q I'm just going to read, Section  
16 118-1 says, "Authority of Planning Board to  
17 Approve Plats. Pursuant to provisions of  
18 Section 7-728 of the Village Law, the Board of  
19 Trustees authorizes the Planning Board to review  
20 and approve or disapprove subdivision plats  
21 showing lots, blocks, or sites with or without  
22 roads within the area of the Village."

23 Now the subdivision that we're  
24 talking about, Halley Estates II, is that within  
25 the area of the village that's referenced in

1 David Zigler

2 Section 118-1?

3 A Absolutely.

4 Q Is it the planning board that  
5 authorizes the final subdivision approval for the  
6 Halley Estates II?

7 A Yes.

8 Q Have they authorized the final  
9 approval for that subdivision?

10 A Not yet, no.

11 Q Okay. This is not page numbered but  
12 in the definition section it says, "Subdivision  
13 plat or Final Plat, and it says, I quote, "A  
14 drawing, in final form, showing a proposed  
15 subdivision and containing all information or  
16 detail required by law, and by these regulations,  
17 to be presented to the planning board for  
18 approval, and which if approved may be duly filed  
19 or recorded by the applicant in the office of the  
20 County Clerk."

21 With respect to the final plat, is  
22 that what would be submitted to the village  
23 planning board?

24 A For final review you submit a map,  
25 but then after you receive final approval,

1 David Zigler

2 usually you have revisions to that submission.

3 So then the planning board usually gives the  
4 advisors, whoever has to review it, you know,  
5 obligation to review those revisions before they  
6 sign off.

7 Q Is it stamped at all, the final map?

8 A It has to be stamped to be filed in  
9 the County Clerk's office.

10 Q Who would stamp it?

11 A Village of Pomona has to stamp it,  
12 either the secretary in some cases or the  
13 chairperson of the board has to sign it.

14 Q Would that map have to show steep  
15 slope approval?

16 A Would it have --

17 Q Or compliance with the steep slope  
18 law?

19 A No, not at all.

20 Q Why do you say that?

21 A Because you don't have to comply to  
22 steep slopes until you apply for a building  
23 permit.

24 Q In conjunction with the final  
25 approval of a subdivision, don't you have to show

1 David Zigler

2 that you're complying with the steep slope law?

3 A I kind of agree with what you're  
4 saying, but no, by the application you apply for  
5 steep slope law when you apply for a building  
6 permit, because it's a site-specific house.

7 Q Would the final map show  
8 hypothetical houses?

9 A Yes, generic hypothetical houses,  
10 yes.

11 Q What if you built something within  
12 the confines of the hypothetical house, would you  
13 have to then get steep slope approval?

14 A If the lot qualifies, yes.

15 Q Qualifies as what?

16 A Being subject to the steep slope.

17 Q So whether or not you built within  
18 the hypothetical footprint, is it your  
19 understanding you would have to go back and get  
20 the steep slope approval if you built the house  
21 within the envelope of the footprint or if you  
22 exceeded the footprint?

23 A That's what their interpretation was.  
24 two or three weeks ago, yes.

25 Q Who are you referring to?



1 David Zigler

2 A Planning board at the workshop.

3 Q Who was at that workshop?

4 A Just the advisors, the Village  
5 Engineer, the Village Attorney and the Village  
6 Planner. The chairperson was not there.

7 Q I don't know if I showed you this,  
8 but this is a document that was marked Exhibit D  
9 at a nonparty deposition dated 3/25/08. I ask  
10 you to take a look at that.

11 A That's no.

12 Q What is that document?

13 A Agenda of the planning board.

14 Q That's not a workshop, that's not  
15 referencing a workshop meeting, correct?

16 A No, this was a planning board  
17 meeting.

18 Q Did you participate at the meeting?

19 A Absolutely.

20 Q When was the meeting?

21 A March 25th.

22 Q Was that at 10 A.M.?

23 A No, that was -- oh, this is a  
24 workshop, yes, this was a workshop.

25 Q Who was present at this workshop?

1 David Zigler

2 A The same people I mentioned and John  
3 Edwards.

4 Q What does TAC stand for, T-A-C?

5 A Technical Advisory Committee.

6 Q Okay, meeting. What was discussed  
7 at that meeting, if you know?

8 A Landscaping, because the planner  
9 wanted to see two things; he wanted us to mark  
10 the tree map which is part of that map set that  
11 I -- and we had to mark each tree that was going  
12 to be removed, and they wanted to see a planting  
13 for the street trees. And the other thing that  
14 had to do that came up was discussion of the  
15 steep slopes and the access off of lot 13 from  
16 Call Holler Road. Three basic things, it was a  
17 very quick meeting.

18 Q Was the agenda for final approval on  
19 subdivision discussed at that TAC meeting, or not  
20 agenda but plans for submitting?

21 A Yes, the plans had been submitted  
22 and we had a public hearing for final. At this  
23 workshop was -- no, I'm sorry, this is March,  
24 we're in April, right? Yes, this was for the  
25 public hearing in April.

David Zigler 30(b)(6)

May 2, 2008

New City, NY

Page 107

1 David Zigler

2 Q Was that public hearing held?

3 A Yes.

4 Q Did you participate at that public  
5 hearing?

6 A Yes, very little. John Edwards did  
7 most of the speaking.

8 Q As a result of the public hearing,  
9 what, if anything, happened?

10 A They probably would have voted for  
11 final if we requested them, but the Chairman of  
12 the Board wasn't there and we didn't think it was  
13 appropriate, so we asked to continue the public  
14 hearing until the next month, meaning May.

15 Q When is the next planning board  
16 meeting?

17 A I think May 8th.

18 Q At that May 8th planning board  
19 meeting, do you or Briarwood Farms plan on asking  
20 the planning board to make final approval of the  
21 subdivision?

22 A No, probably John Edwards would ask  
23 for that, but we have been led to believe that  
24 they are prepared and they have a document, a  
25 resolution, and they are prepared to vote on it,

1 David Zigler

2 final.

3 Q The planning board is prepared?

4 A Yes.

5 Q Where did you obtain that  
6 understanding?

7 A During the workshop, from the last  
8 meeting and --

9 (Phone interruption)

10 Q During any of the conversations that  
11 you had with Mr. Hershkowitz, Mr. Tirschwell,  
12 after Toll Brothers raised issues in its December  
13 22nd letter, did Mr. Tirschwell and Mr.  
14 Hershkowitz ever refer to the agreement of sale  
15 in any of those discussions with you?

16 A Absolutely.

17 Q What I mean by the agreement of  
18 sale, I meant the contract between Briarwood  
19 Farms and Toll Brothers?

20 A Just to say that Toll Brothers was  
21 trying to get out of the contract, yes.

22 Q What was specifically said to you in  
23 that regard, if you recall?

24 A That would be it. I mean, just  
25 basically discussed the concerns that were in the

1 David Zigler

2 letters, and why there are concerns, you know,  
3 not going smooth. That's about it, pretty  
4 generic.

5 Q Did you have a copy of the contract  
6 between Toll Brothers and Briarwood Farms at the  
7 time?

8 A No.

9 Q Did you ask to see a copy of the  
10 contract?

11 A No. As a matter of fact, when  
12 people send me contracts in single home sales, we  
13 just throw them out. It's not my business.

14 Q Did you ask to see any provisions of  
15 the contract?

16 A No.

17 Q Were any provisions sent to you?

18 A No, other than what was discussed  
19 with them as provisions in the contract, that was  
20 it. You know, whatever was in them letters,  
21 that's the only thing I ever discussed.

22 Q So is it fair to say, other than  
23 that which was contained in the letters between  
24 Toll Brothers and Briarwood Farms, you have no  
25 knowledge of the contract or terms?

New City, NY

Page 110

1 David Zigler

2 A No.

3 MR. BENENATI: I don't have any  
4 further questions.

5 MR. HASPEL: We are done.

6 (Whereupon, at 1:51 P.M., the  
7 deposition was concluded.)

8

9

10

11

David ZIGLER

12

13

14 Subscribed and sworn to before me

15 this \_\_\_\_\_ day of \_\_\_\_\_, 2008.

16

17

18 NOTARY PUBLIC

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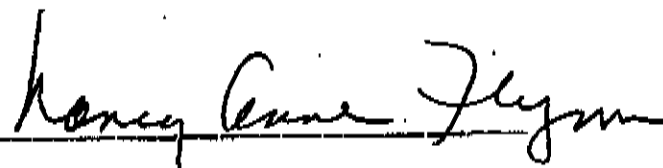
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REPORTER'S CERTIFICATE OF CERTIFIED COPY

I, NANCY ANNE FLYNN, a Registered Professional Reporter, certify that the foregoing pages constitute a true and correct copy of the original deposition of

I declare under penalty of perjury that the foregoing is true and correct.

Dated this          day of



NANCY ANNE FLYNN, RPR